



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

JRE

Docket No: 8310-97

23 December 1999

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: [REDACTED];  
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments  
(2) Director, NCPB ltr 5420 Ser: 99-37, 19 May 99  
(3) Microfiche service record  
(4) VA records w/copy of naval health record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was retired by reason of physical disability.

2. The Board, consisting of Messrs. Mazza, Pauling and Pfeiffer reviewed Petitioner's allegations of error and injustice on 2 December 1999 and, pursuant to its regulations, recommended the corrective action specified below. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner, who had a mandatory retirement date of 1 April 1996, underwent a pre-retirement physical examination on 9 January 1996, and was found qualified for worldwide service. He was seen at an emergency room on 6 February 1996 for the first of a series of attacks of vertigo, dizziness, and nausea with vomiting and severe sweating. He was felt to have labyrinthitis and was treated accordingly. The attacks continued into March 1996, and Petitioner requested to be retained on active duty until a firm diagnosis was made, and appropriate treatment initiated. On 24 March 1996, differential diagnoses of "tumor versus

Meniere's" disease were established. According to Petitioner, a Navy physician denied his request for retention on active duty, and he was transferred to the Retired List effective 1 April 1996. On 24 April 1996, he was given differential diagnoses of atypical migraines, atypical Meniere's disease, labyrinthitis, and possible endogenous depression. He was noted to have resolving major depression 29 May 1996. A civilian physician established the diagnosis of Meniere's disease on 6 September 1996

d. In correspondence attached as enclosure (2), the Board was advised by the Director, Naval Council of Personnel Boards (NCPB), in effect, that Petitioner's medical condition did not render him unfit at the time of his retirement nor did he meet the standards required to overcome the presumption of fitness defined in paragraph 2056, SECNAVINST 1850.4C. The Director noted that the diagnosis of Meniere's disease was not established until after Petitioner had retired. The Director stated that while there is no question that the condition was incurred when Petitioner was on active duty, it is less certain that it met the "acute/grave" standard required to overcome the presumption of fitness. In the Director's opinion, this case is clear example of the difference between "service connection", which confers Department of Veterans Affairs ratability, and "unfitness" which is required to be considered for a disability rating from the DOD Disability Evaluation System. The documentation clearly confirms the former and fails to establish the latter. In summary, the Director concludes that Petitioner has not successfully rebutted the presumption of fitness, and accordingly, he recommends that the petition be denied.

e. Petitioner contends, in effect, that he was severely impaired and unfit for duty because of the effects of Meniere's disease. He states that he had obtained his "Airline Transport Ratings" as a pilot prior to his retirement, and that the diagnosis of Meniere's disease disqualifies him from working as a civilian pilot. In addition, he notes that other employers are less likely to hire him, because they do not want an individual who "can go belly up" at any time.

f. Paragraph 2056, SECNAVINST 1850.4C provided, in effect, that the purpose of the disability statutes is to compensate those members who were, due to physical disability, unable to complete their careers and qualify for normal retirement benefits. When a member continued to perform the normal duties of his or her office, rank, grade or rating until commencing processing for non-disability retirement or separation, it shall be presumed that he was fit for duty. This presumption can be overcome if it can be established by a preponderance of evidence that the member, in fact, was physically unable to adequately perform his duties even though he was improperly retained on duty for a period of time; or if an acute grave illness or injury, or other deterioration of physical condition occurred immediately prior to or coincidentally with non-disability retirement or separation processing which rendered him unfit for duty.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the

comments contained in enclosure (2), the Board concludes that Petitioner was unfit for duty because of undiagnosed Meniere's disease at the time of his transfer to the Retired List, and should have been retired by reason of physical disability. In this regard, it concludes that there was an acute, grave deterioration of his physical condition immediately prior to his retirement, which rendered him unfit for duty and rebuts the presumption of fitness by a preponderance of evidence.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.


**RECOMMENDATION:**

a. That Petitioner's naval record be corrected to show that he was transferred to the Temporary Disability Retired List effective 1 April 1996, with a disability rating of 30% under VA code 6205.


b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above-entitled matter.

ROBERT D. ZSALMAN  
Recorder

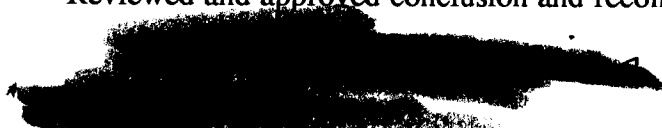
  
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

  
Executive Director

JAN 13 2000

Reviewed and approved conclusion and recommendation:

  
Deputy Assistant Secretary of the Navy  
(Personnel Programs)